85-1978

Supreme Court, U.S.
FILED
MAY 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF FLORIDA,

vs.

URBANO TORRES,

Respondent.

On Petition for a Writ of Certiorari

to the Florida Third District Court

of Appeal

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

I

WHETHER A CONVICTED FELON'S COLLATERAL ATTACK UPON HIS PLEA OF GUILTY BASED UPON HIS SWORN ASSERTION THAT THE PLEA WAS KNOWINGLY BUT NOT VOLUNTARILY ENTERED DUE TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IS SUBJECT TO THE STANDARD OF REVIEW SET FORTH IN HILL V. LOCKHART, 474 U.S. ___, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) AND THE DECISION OF THE FLORIDA DISTRICT COURT OF APPEAL IGNORING THE PREJUDICE ISSUE AND FINDING A PER SE VIOLATION UNDER BOYKIN V. ALABAMA, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) CONSTITUTES AN EXPRESS CONFLICT WITH HILL AND OTHER STATE AND FEDERAL COURT OPINIONS.

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PROPOSITION I

A convicted felon's collateral attack upon his plea of guilty based upon his sworn assertion that the plea was knowingly but not voluntarily entered due to ineffective assistance of trial counsel is subject ot the standard of review set forth in Hill v. Lockhart, 474 U.S. ___, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) and the decision of the Florida District Court of Appeal ignoring the prejudice issue and finding a per se violation under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) constitutes an express conflict with Hill and other state and federal court opinions.

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I

OPINION BELOW

The opinion of the Florida Third District Court of Appeal on Respondent's collateral appeal from the trial court order denying a Motion to Vacate his guilty plea is reported as Torres v. State ____ So.2d____ (Fla. 3d DCA 1986) (A. 1) [1].

The lack of a direct and express conflict on the face of this opinion precluded the Petitioner from invoking the discretionary review jurisdiciton of the Florida Supreme Court. See, e.g. Carter v. State, 331 So.2d 293 (Fla. 1976).

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[1] The symbol "A" is used to designate the appendix to this brief.

II

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Rule 17 (b) and (c) of the Rules of the Supreme Court and 28 U.S.C. §1257(3). The opinion of the Florida Third District Court of Appeal was filed on March 18, 1986. (A. 1-2). A timely filed Motion for Rehearing and/or Clarification was denied on April 14, 1986. (A. 3).

III

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The applicable provisions of the United States Constitution read as follows:

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiciton thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiciton the equal protection of the laws.

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT V

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deparived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IV
STATEMENT OF THE CASE

Mr. Urbano Torres pled guilty to the crime of First Degree Murder in the Circuit Court of Dade County, Florida and thereby avoided a possible death sentence. (A. 32-40). One month later he filed a Motion for Post Conviction Relief under Florida Rule of Criminal Procedure 3.850. As required by the state rule the Motion for Post Conviction Relief was accompanied by a sworn statement indicating Mr. Torres had read the motion and had personal knowledge that the facts and matters contained in the motion were true. (A. 29). Ground one of the motion asserted that the plea of guilty was not voluntary with an understanding of the consequences of said plea. (A. 25). Mr. Torres admitted he pled guilty out of fear for his life because his lawyer rufused to make any effort towards

preparing a defense. The trial court held an evidentiary hearing on the motion. (A. 10-15). Torres was represented by a Public Defender and testified in support of his motion. (A. 10-15). At that time he again admitted his plea was knowingly made but, none-the-less, involuntary. The trial court denied the motion. (A. 30)

The guilty plea colloquy is not a model for other courts to follow. However, it does clearly indicate that Mr. Torres knew he was pleading guilty to charges of First Degree Murder in exchange for the State's agreement not to seek the death penalty. (A. 35-37). The record shows a lawyer was appointed to represent Mr. Torres and did so at every necessary stage of the proceedings. (A. 32-40); that Mr. Torres knew he was waiving his right to a jury trial and right to appeal his conviction and sentence. (A. 35-37);

and lastly, that the plea was supported by facts set forth in three suppression motions which focused on the live testimony of various witnesses and the detailed, recorded confession of the Respondent. The prosecution proffered that evidence as a basis for showing a prima facie case of guilt and the defense did not object. (A. 37-38).

Florida's Third District Court of Appeal summarily reversed the trial court and ordered the plea of guilty set aside upon the singular authority of Boykin v. Alabama, 395 U.S. 238 (1969). (A. 1-2). The lack of any express or direct conflict with other decisions of the State Supreme Court or State Courts of Appeal foreclosed any further litigation in the State Court system. Rehearing was denied and a mandate issue on April 30, 1986.

V

REASONS FOR GRANTING CERTIORARI

PROPOSITION I

A convicted felon's collateral attack upon his plea of guilty based upon his sworn assertion that the plea was knowingly but not voluntarily entered due to ineffective assistance of trial counsel is subject to the standard of review set forth in Hill v. Lockhart, 474 U.S. ____, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) and the decision of the Florida District Court of Appeal ignoring the prejudice issue and finding a per se violation under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) constitutes an express conflict with Hill and other state and federal court opinions.

The Florida Third District Court of Appeal has incorrectly applied the rule of Boykin v. Alabama, 395 U.S. 238 (1968) to a set of facts which required the application of the rule of Hill v. Lockhart, 474 U.S. ___, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). By refusing to consider the Defendant's sworn allegations of ineffective assistance of trial counsel

and attendent threats of imposition of the death penalty under the Hill standard, the lower court has created conflict with this Court's recent declaration that the fundamental interest in the finality of guilty pleas is not to be easily overlooked. Hill, at 88 L.Ed.2d 209-210. While the opinion of the state court says little about why the decision was made to reverse this judgment and set aside the guilty plea the sworn motion to vacate filed by Respondent and his testimony during the evidentiary hearing. (A. 12-13, 25-26) speaks volumes as to why this Court should intercede by summarily reversing the decision and instructing the Florida appellate court to consider this appeal under the standard enunciated in HIll, supra

The Florida Court's unexplained reference to Boykin, (A. 2), suggests an opinion that there was a lack of

significant personal exchange between the trial judge and the Respondent on the various rights which are waived by a guilty plea. If that perception is behind what occured below the Court badly missed the mark in evaluating the allegations contained in the Motion for Post-Conviction Relief and the testimony given by Respondent at the evidentiary hearing. Nowhere in those pleadings or remarks does Respondent raise a complaint about the accuracy or adequacy of the plea colloquy. His complaint was solely that he was forced to plead guilty to save his life. (A. 25) The trial court rule on that issue alone and correctly held the motion was insufficient because the fear of the possible punishment does not alone constitute grounds of involuntariness, Brown v. Perini, 718 F.2d 784, 786 (6th Cir. 1983)(citing Brady v. United States, 397 U.S. 749 (1970) for proposition that

a guilty plea is not involuntary just because it was entered to avoid the possible imposition of the death penalty.), see also Blue v. Wainwright, 739 F.2d 320, 322 (8th Cir. 1984) and Jones v. Parker, 734 F.2d 1142, 1147 (6th Cir. 1984); and because the trial court had previously stated during the plea colloquy that it was aware of the trial counsel's diligent pre-trial investigation and preparation of the case. (A. 37). Under Hill v. Lockhart, the motion and supporting argument does not allow a reversal on grounds that the plea was not knowingly and voluntarily entered on advice of competent counsel. Respondent knew what he was giving up by pleading guilty and answered "yes" when asked if his reason for pleading guilty was to avoid the death penalty. (A. 37). He never asserted that the plea was not made with full understanding of the rights he

would forfeit. Furthermore, at no time did the Respondent argue that the record of the plea colloquy failed to conclusively rebut his allegations. Respondent simply asserted that the plea, although knowingly made, was involuntarily and that the lack of voluntariness was strictly the fault of his hostile trial counsel. (A.14-15). Such allegations fall under the rule of Hill not Boykin and require both allegation and proof of prejudice-something not raised here.

The Petitioner gave the lower court plenty of opportunity to rule under the Hill standard. (A. 4-17). The refusal to do so indicates a clear departure from precedent which, given the seriousness of the crime, merits this Court's attention. A summary reversal with instruction to reconsider the case under the appropriate standard would satisfy the Petitioner that

justice would be done in this most usual matter.

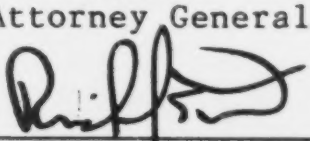
VI

CONCLUSION

This Court is therefore urged to accept this case to resolve the conflict concerning the instant issues of compelling national importance.

RESPECTFULLY SUBMITTED on this _____ day of June, 1986, at Tallahassee, Florida.

JIM SMITH
Attorney General



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NO.

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October Term, 1985

THE STATE OF FLORIDA,

vs.

URBANO TORRES,

Respondent.

On Petition for a Writ of Certiorari

to the Florida Third District

Court of appeal

APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

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A.

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1986

URBANO TORRES, **

Appellant, **

vs. ** CASE NO. 84-793

THE STATE OF FLORIDA,**

Appellee. **

Opinion filed March 18, 1986.

Rehearing Denied April 14, 1986

An Appeal from the Circuit Court for Dade County, Ralph N. Person, Judge.

Bennett H. Brummer, Public Defender, and Elliot H. Scherker, Assistant Public Defender, for appellant.

Jim Smith, Attorney General, and Richard E. Doran, Assistant Attorney General, for appellee.

Before SCHWARTZ, C. J., and HUBBART and DANIEL S. PEARSON, JJ.

PER CURIAM.

The order denying the defendant's motion for post-conviction relief is reversed upon a holding that the evidence before the trial court indisputably failed to establish that the defendant's entry of a guilty plea to the charges against him was knowingly and voluntarily made with an understanding of the consequences. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Williams v. State, 316 So.2d 267 (Fla. 1975).

Reversed and remanded for further proceedings.

A. 3

IN THE DISTRICT
COURT OF APPEAL OF
FLORIDA THIRD DISTRICT

JANUARY TERM, A.D.
1986
MONDAY, APRIL 4,
1986

URBANO TORRES, **

Appellant, **

vs. ** CASE NO. 84-793

THE STATE OF FLORIDA, **

Appellee. **

**

Upon consideration, appellee's motion for rehearing and/or certification of question to the Florida Supreme Court is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By: _____
Deputy Clerk

cc: Richard E. Doran
Elliot Scherker

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO. 84-793

URBANO TORRES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING AND/OR CERTIFICATION OF QUESTION TO THE FLORIDA SUPREME COURT

Appellee, State of Florida, respectfully moves for rehearing and clarification of the court's opinion in this case issued March 18, 1986 pursuant to Rule 9.330(a), Fla.R.App.P (1986). In support of this motion Appellee contends:

I. The court has overlooked the Appellee's supplemental cases of Hill v. Lockhart, 473 U.S.__,106 S.Ct.366 (1985)

and United States v. Guichard, 779 F.2d 1139 (5th Cir. 1986) which are directly and expressly in conflict with the views expressed by the panel. The Fifth Circuit's Guichard opinion states:

> Rule 11 "creates a prophylactic scheme designed to insure both that guilty pleas are constitutionally made and that a full record will be available in the event that a challenge is made to the plead." United States v. Adams, 634 F.2d 830, 837 (5th Cir.1981). To this end, Rule 11 specifieds a long list of substantive and procedural requirements to be observed before a guilty plea is accepted. This Court does not, however, require "letter-perfect" compliance with all of these requirements. See United States v. Dayton, 504 F.2d 931, 939 (Cir. 1979) (en banc), cert. denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980). Indeed, in 1983 Rule 11(h) was added to ensure application of a harmless error rules in appeals based on noncompliance.

In Dayton, we held en banc that if the three core concerns of Rule 11 are met--that the guilty plead is free from coercion, that the accused understands the nature of the charges against him, and that the accused knows the direct consequences of his guilty plea--there is no violation of the body or spirit of Rule 11. Dayton, supra, at 939-40. We found that reversible error exists only when there is an "entire failure" to address any of the three core concerns of Rule 11. Id. at 939-40. However, an "inadequate address," or less than "letter-perfect" compliance with Rule 11, is harmless error if the three core concerns are met and the accused has shown a desire "to come to terms with the legal system, and to admit his fault." Id. at 940. We noted that an earlier intimation by the Supreme Court that "prejudice inheres in a failure to comply with Rule 11," McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 1173, 22 L.Ed.1.2d 418 (1969), concerned a much simpler version of Rule 11 than the Rule at issue in Dayton. Dayton, supra, at 939-40. McCarthy, we found, was concerned with the core values of Rule 11 and should not be extrapolated to require/

strict compliance with the "punctilios" of a now greatly expanded and more detailed Rule 11. Id. at 940. The dissent in Dayton disagreed with this analysis, observing that "[a]lone among the circuits that have considered the question, this court now refuses to require literal compliance with Rule 11." Id. at 948 (footnote omitted). Thus even before the adoption of Rule 11(h) we held that specific Rule 11 rights are often ancillary to the larger McCarthy concerns, and that all Rule 11 errors do not therefore require automatic reversal.

Confrontation of Witnesses

Appellant claims that during the Rule 11 proceeding accompanying his guilty plea the district judge failed to warn him that his plea waived his right to confront the witnesses against him, as required by Rule 11(c)(3). The record does indeed indicate that the district court neglected expressly to inform appellant that a guilty plea waived his right to confront witnesses, but the record also shows that all of the other requirements of Rules 11, in particular Rule 11(c), were met. Thus, as appellant claims, the record

contains technical error. As noted, however, reversal requires more than this; it requires an entire failure to meet a core concern. See id.

[1] Of the three core concerns of Rule 11, only the requirement that the accused knows the direct consequences of his plead is implicated when the accused alleges that he was not informed that a guilty plea waived his right of confrontation. In determining whether the appellant was knowledgeable of these consequences, we observe that he was informed of all other Rule 11 rights, including, inter alia, that he waived the right to a jury trial, that he waived the right not to testify against himself, that he knew the maximum penalty against him, and that he waived the right to force the state to meet its burden of proof beyon a reasonable doubt. See note 3, supra. Where, as here, the only deficiency respecting this core concern is the singular failure to mention one Rule 11(c) right, here the right of confrontation, we cannot hold that this constitutes an "entire failure"to inform the appellant of the consequences of his plea. Appellant knew he had waived a trial at which he did not have to testify and the

government had to affirmatively prove his guilt, and could not rely on any failure of his to testify, all of which to a significant extent implies a waiver of the right of confrontation. Moreover, we observed that appellant had the competent counsel who obviously had advised him both of the charge and the ramifications of a guilty plea. We find, therefore, that appellant knew the consequences of his plea. United States v. Caston, 615 F.2d 1111, 1115-16 (5th Cir.), cert. denied, 449 U.S. 831, 101 S.Ct. 99, 66 L.Ed.2d 36 (1980).

Additionally, in the past we have held similar types of errors harmless. See Caston, supra, at 1115-16. In Caston, for example, we held that despite the district judge's failure to inform the defendant of his right to a jury, of his right to the assistance of counsel at trial, of his right not to incriminate himself at trial, and that his sworn answers to the court's questions could be used against him in perjury charges, all of which are required by Rule 11, the error was harmless. Caston, supra.

* * *

Our analysis is further strengthened by the addition of

> section (h) in the 1983 amendments to Rule 11, providing: "Any variance from the procedures required by this rule which does not affect substantive rights shall be disregarded." This amendment reversed the per se doctrine then in vogue for Rule 11 violations, see Dayton, supra, at 948 (dissent), and instituted a harmlelss error analysis. Like Fed.R.Crim.P. 52(a), the harmless error provision for most other criminal case procedural violations see Rule 11(h) advisory committee notes (discussing how McCarthy led many appellate courts to reject harmless errors for Rule 11 cases), the new Rule 11(h) does not attempt to define harmless error.
>
> Id. at 1142-43. (Footnotes omitted) (emphasis added).

What was alleged below, as is so clearly evidenced by the motion to vacate[1] and supplemental transcript of the

---

[1] The motion to vacate alleges:

A. Ground One: Conviction obtained by plea of guilty which was not made volun-

February 6, 1984, evidentiary hearing, is a claim of ineffective assistance of counsel which caused the defendant to plead guilty out of fear for his life:

tarily with the understanding of the consequences of the plea.

Supporting FACTS (tell your story briefly without citing cases or law):

Defendant was charged with First Degree Murder. He was represented by a Court-appointed Special Public Defender. Defendant pleaded guilty on the basis of threats by the police that he would certainly receive the death penalty if he did not do so. When he asked his attorney for advice, he was told the same thing. Seeing no possible way to win in this situation, since his Court-appointed counsel did not appear to be willing to use his full abilities to prevent a conviction, and given the threats of the police, the Defenant unwillingly peaded guilty.

[MR. EVANS]: Now, in your affidavit you say that when you asked your attorney what you should do, you say he did not appear to be willing to use his full abilities to prevent a conviction and that seeing no possible way, you confessed, and that your attorney told you that you would possibly get the death penalty if you didn't confess and plead guilty. Are those the allegations that you are making against your former attorney?

A. Yes.

Q. Tell me what happened between you and the attorney, what he said, what you said and why you pled guilty.

A. About three or four--sometime--three or four days before I was sentenced, the attorney the gentleman who was there, went to the cells there down below and he told me that they were asking the electric chair for me.

I told him that I was innocent, that, please, to do someting for me. He said, no, I can't do anything for you. And he said to me, you are going to plead guilty? And I said, yes. He said, why? That is because I have no family there and I was scared that my mother should find out that they

> had--that they had put me in the electric chair.
>
> (S.R.8).

Based on the allegations made in the pro se motion to vacate sentence (R.121) and during the evidentiary hearing of February 6, 1984, the defendant was required to allege and prove prejudice, as argued vigorously by appellee but, apparently, overlooked by the court. The United States Supreme Court could not have been more clear in the Hill case.

> In addition, we believe that requiring a showing of "prejudice" from defendants who seek to challenge the validity of their guilty pleas on the ground of inefective assistance of counsel will serve the fundamental interes in the finality of guilty pleas we identified in Unted States v. Timmreck, 441 U.S. 780, 99 S.Ct.2085, 60 L.Ed.2d 643 (1979).
>
> Id. at 106 S.Ct. 370.

It appears that the panel's review of the issue of a "knowing and voluntary" waiver of rights has focused on the "knowing" element instead of the "voluntary" element. If this is true, the court has overlooked the specific allegations in the motion to vacate (R.121) and the statements of the appellant at the hearing when questioned by his assistant public defender as to the thrust of his complaint:

> Q. During this conversation did you understand everything that was being said to you through the interpreter?
>
> A. Yes.
>
> Q. You have sworn to the allegations set forth in this motion that you filed; correct?
>
> A. Yes.
>
> Q. In this affidavit that you swore to you state, "Seeing no pos-

sible way to win in this situation, sinxw his Court-appointed counsel did not"--

A. Yes---

Q. --conviction and given the threat to the police, the defendant unequivocally plead guilty."

Is that your allegation today in Court?

A. Yes.

MR. EVANS That's it for me at this point.

(S.R.11).

The record unequivocally refutes the notion that the plea was not "knowingly" made and refutes the notion that appellant did not understand either the charges against him or the direct consequences of the plea. This is why Boykin v. Alabama, 395 U.S. 238 (1969) does not control in this matter! The only specific omssions of constitutional rights in the plea colloquy were the indications of a

right to compel the production of evidence and the right to cross-examination. These constitutional concerns are not core requirements of the plea, Guichard, supra, and the failure to include them in the process of the plea colloquy does not, absent a showing of prejudice, render this guilty plea invalid. Rule 3.172(i), Fla.R.Cirm.P. (1977). Appellee contends the panel has overlooked this crucial distinction between cases where there is a voluntarily guilty plea without any understanding of what that action means and cases, such as this one, where a defendant knows what he is doing and what it means, but claims he had no other choice because his lawyer would not help him win his case.

Wherefore, appellee respectfully requests the court recall this opinion and affirm the order of the trial court. In this alternative, appellee requests the court certify the question to the Florida Supreme Court.

Respectfully submitted,

JIM SMITH
Attorney General

/s/
RICHARD E. DORAN
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I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION FOR REHEARING AND/OR CERTIFICATION OF QUESTION TO THE FLORIDA SUPREME COURT was furnished by mail to ELLIOT SCHERKER, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 21 day of March, 1986.

/s/
RICHARD E. DORAN
Assistant Attorney General

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT, IN
AND FOR DADE COUNTY,
STATE OF FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. / CASE NO. 83-4248
/
URBANO TORRES, /
/
Defendant. /
/
_____/

MOTION FOR POST CONVICTION RELIEF

COMES NOW the defendant URBANO TORRES, pro se, pursuant to the allowance of Rule 3.850 Fla.R.Crim.P., and moves this Court as aforesaid, alleging the following in support hereof:

1. Name and location of the Court which entered the Judgment of Conviction under attack: Eleventh Judicial Circuit Court, in and for Dade County, Miami, Florida .

2. Date of Judgment of conviction: October 4, 1983 .

3. Length of Sentence: Life .

4. Nature of offenses(s) involved

(all counts): _____
Murder First Degree _____.

5. What was your plea? (check only one).

(a) Not guilty ____
(b) Guilty XX
(c) Nolo contendere ____
(d) Not guilty by reason of insanity ____

If you entered one plea to one count, and a different plea to another count, give details: _____.

6. Kind of trial (check only one):

(a) Jury___
(b) Judge only, without jury XX

7. Did you testify at the trial or at any pre-trial hearing?

Yes____ No XX

8. Did you appeal from the Judgment of conviction?

Yes_____ No XX

9. If you did appeal, answer the following:

(a) Name of Court:_____
(b) Result:_____
(c) Date of result:_____
(d) Citation (if known):_____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions,

etc., with respect to this judgment in this court?

Yes____ No __XX__

11. If your answer to number 10 was "yes" give the following information (applies only to proceedings in this court):

(a) (1) Nature of the proceedings:

_____

(2) Grounds raised:_____

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes _____ No_____

(4) Result:_____

(5) Date of result:_____

(b) As to any second petition, application, motion etc., give the same information:

(1) Nature of proceeding:

_____

(2) Grounds raised:_____

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes_____ No _____

(4) Result:_____

(5) Date result:_____

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment in any other court?

Yes ____ No XX

13. If your answer to number 12 was "yes" give the following information:

(a) (1) Name of Court:_____

(2) Nature of the proceedings:

_____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, applicaiton, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(b) As to any second petition, application, motion, etc., give the same informaiton:

(1) Name of Court:_____

(2) Nature of the proceeding:

_____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(c) As to any third petition, application, motion, etc., give the same informaiton:

(1) Name of Court: _____

(2) Nature of the proceeding:

_____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.
For you information, the following is a list of the most frequently

raised grounds for post conviciton relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that your conviction or sentence is unlawful.
DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the Court if you merely check (a) through (l)

(a) Conviction obtained by plea of guilty or nolo contendere which was unlawfully induced or not made voluntarily with the understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected or impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

(k) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute).

(l) Sentence in excess of the maximum authorized by law.

A. Ground One: Conviction obtained by plea of guilty which was not made voluntarily with the understanding of the consequences of the plea.

Supporting FACTS (tell your story briefly without citing cases or law):

Defendant was charged with First Degree Murder. He was represented by a Court-appointed Special Public Defender. Defendant pleaded guilty on the basis of threats by the police that he would certainly receive the death penalty if he did not do so. When he asked his attorney

for advice, he was told the same thing. Seeing no possible way to win in this situation, since his Court-appointed counsel did not appear to be willing to use his full abilities to prevent a conviction, and given the threats of the police, the Defendant unwillingly pleaded guilty.

B. Ground Two: Conviction obtained by used of coerced confession.

Supporting FACTS (tell your story briefly without citing cases or law).

The victim in this case was a good friend of the Defendant. Although the Defendant was read his rights under the Miranda decision, he confessed to the crime due to the threat of the police interrogation team that unless he did confess, he would receive the death penalty for his offense. Defendant was sufficiently frightened by this threat that the dry, pro forma reading of the Miranda rights did not make an impression. Defendant did not ask for an attorney until September, 1983, after being arrested and giving his confession in February, 1983, some seven months earlier, Defendant asserts that the threat of the electric chair by the police was unduly coercive and resulted in his confession.

C. Ground Three: _____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

D. Ground Four:_____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

15. If any of the grounds listed in 14A. B. C. and D were not previously presented on your direct appeal, state briefly what grounds were not so presented, and give your reasons why they were not so presented:

No appeal was taken, or could be taken, from a guilty plea.

16. Do you have any petition, application, appeal, motion, etc., now pending in any Court, either state or federal, as to the judgment under attack?

Yes ____ No XX

17. If your answer to number 16 was "yes", give the following information:

(a) Name of Court:_____

(b) Nature of the proceeding:_____

_____

(c) Grounds raised: _____

_____

(d) Status of the proceedings:

_____

18. Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:

(a) At preliminary hearing: Harold T. Fields, Jr., Suite 204, 1333 Coral Way, Miami, Florida 33145

(b) At arraignment and plea: Harold T. Fields, Jr.

(c) At trial: Not Applicable

(d) At sentencing: Harld T. Fields Jr.

(e) On appeal: Not Applicable

(f) In any post conviction proceedings: Pro se

(g) On appeal from any adverse ruling in a post conviction proceeding: Not Applicable

WHEREFORE, Movant prays that the Court grant all relief to which he may be entitled in this proceeding, including not not limited to:

1. That the Court order an evidentiary hearing be held in the issues of involuntary plea and coerced confession and appoint a Special Public Defender to represent Defendant therein.

2. That the Court allow Defendant to withdraw his guilty plea and proceed to trial on the charges, and order the suppression of Defendant's coerced confession.

3. Such other and further relief as the Court deems just and proper.

STATE OF FLORIDA)
) ss.
COUNTY OF UNION)

Before me, the undersigned authority, this day personally appeared URBANO TORRES who first being duly sworn, says that he is the Defendant in the above styled cause that he has read the foregoing Motion for Post Conviction Relief and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct to the best of his knowledge and belief.

/s/
Defendant, pro se

SWORN AND SUBSCRIBED TO before me this 3rd day of November, 1983.

/s/
NOTARY PUBLIC STATE OF FLORIDA

My Commission Expires: NOTARY PUBLIC, STATE OF FLORIDA AT LARGE MY COMMISSION EXPIRES NOV. 5, 1983

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

THE STATE OF FLORIDA
VS# 83-4248
URBANO ACUNAS TORRES AKA:
RAFAEL HERNANDEZ
Defendant

ORDER DENYING MOTION FOR RELIEF PURSUANT TO RCrP 3.850

THIS CAUSE HAVING COME ON BEFORE the Court upon the Motion of the above prisoner for relief pursuant to RULE 3.850, Criminal Procedure, and the Court having examined the said Motion and finding that the allegations contained therein do not constitute legal grounds for granting a New Trial or release of the prisoner, and the Motion being insufficient in substance to support the relief prayed, it is thereupon,

CONSIDERED, ORDERED AND ADJUDGED that the Motion for Relief pursuant to RULE 3.850, Criminal Procedure, filed by the

above prisoner be, and the same is hereby DENIED.

The movant is advised that ___ he has the right to appeal within thirty days of the rendition of this order and is further advised that ___ he may file a Motion for rehearing with fifteen days of the date of service of this order.

DONE AND ORDERED in Open Court at Miami, Dade County, Florida, this 16th day of March, A.D., 1984.

/s/
Judge
RALPH N. PERSON

I CERTIFY that copy hereof has been furnished to movant, Urbano Acunas Torres aka Rafael Hernandez, by mail this 19 day of March, 19 84.

RICHARD P. BRINKER, Clerk

By: /s/
Deputy Clerk

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY,
FLORIDA

STATE OF FLORIDA,	
	CRIMINAL DIVISION
Plaintiff,	
vs.	CASE NO. 83-4248
URBANO TORRES,	
Defendant.	

Metropolitan Justice Building
1351 Northwest 12th Street
Miami, Florida
October 4, 1983
Tuesday, 9:00 a.m.

The above-entitled matter came on for hearing before the Honorable Ralph N. Person, Circuit Judge, pursuant to Notice.

- - -

APPEARANCES:

JANET RENO, State Attorney, by
JAY NOVICK, Assistant State Attorney
on behalf of the State.

HAROLD FIELDS, ESQ.,
on behalf of the Defendant.

ALSO PRESENT:

ANA SHORE, Interpreter

MR. NOVICK: The interpreter is here and we have the defendant.

There is a negotiated plea in this particular case.

It is my understanding that the defendant is going to plead guilty as charged to the indictment and be sentenced to life in prison with a mandatory 25 years for the first-degree murder, and whatever sentence the Court wants to run concurrent; not consecutive.

MR. FIELDS: Yes.

THE COURT: All right.

Raise your right hand and be sworn.

(Thereupon, ANA SHORE, was qualified as the interpreter.)

(Thereupon, URBANO TOREES, a defendant, was duly sworn, after which the following proceedings were had):

THE COURT: All right.

Mr. Torres, please state your name, for the record.

THE DEFENDANT: (Through the interpreter) Urbano Torres.

THE COURT: How old are you, please?

THE DEFENDANT: Twenty years,

THE COURT: Mr. Torres, are you aware of the charges against you?

THE DEFENDANT: Yes, I am.

THE COURT: Your attorney has indicated at this time you are going to enter a plea to the matter of guilty with the understanding the Court will sentence you to life, 25 years minimum mandatory. That this was negotiated with that the State was seeking the death penalty in your case as you are well aware.

Additionally, this case involved confessions and certain legal issues that have already been litigated by the Court; already been removed by the Court against you, and your electing, at this

point, to enter a plea after having fought the case up to this point; is that correct?

You're entering this plea of guilty; is that correct?

MR. FIELDS: Can I have an opportunity to speak to him, your Honor?

THE COURT: Sure, you may.

(Thereupon, other matters were called after which the following proceedings were had on Urbano Torres):

MR. NOVICK: Judge, back on Urbano Torres' case.

THE COURT: Mr. Torres, there are certain rights that you are giving up by entering this plea. You are giving up the right to a trial by jury. The right to be tried by the Court and you are also giving up the right to have your case appealed. That is to appeal the judgment and sentence of the Court from a trial if we

were to, but which we are not having a trial.

You are stipulating to a prima facie case of guilt here and need ---

MR. NOVICK: I would ask the Court to relay what we heard yesterday.

THE COURT: I think we did hear during the suppression, no objection utilates those factors; the purpose of finding a prima facie case of guilt.

The Court should further point out that I was made at least aware that there were at least, even if the lawyers differ, as to how they would be weighed in terms of death. What the State considered to be five good aggravating--one of which is involvement in the other similar type of case in the past. Even though ultimately ended up with not a deathly but an aggravate the crime. But there was death involved; was there not?

MR. NOVICK: Correct. Wasn't similar. In fact there was in Los Angeles.

THE COURT: Mr. Torres, under the circumstances, is this what you are going to do?

THE DEFENDANT: Yes.

THE COURT: I know Mr. Fields has spent a lot of time working on this case, traveling around the country.

Are you satisfied that he understands the nature of this and appreciate the consequences of this guilty plea?

MR. FIELDS: Yes, your Honor.

THE COURT: All right.

The Court at this time, based upon the stipulated facts during the suppression hearing, the Court finds that you are doing this freely and voluntarily.

Mr. Torres has been represented by a competent attorney and the Court will

find the facts which the State would be prepared to prove and which admitted by your plea of guilt would be sufficient to sustain the finding of guilt by the trier of fact.

All right. Judgment sentence-- the Court as to count one, the Court will sentence you to a term of life inprisonment.

Count two, being a concurrent 15 and pursuant to the statute, 25 year minimum mandatory. Even though I didn't read the confession in this case, I know the motions were directed towards the suppression of confession in Court. As a matter of fact, I didn't read the confession.

MR. NOVICK: As a matter of fact, but they were introduced in evidence. They are there for the record.

THE COURT: Okay.

(Thereupon, this hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, the undersigned, do hereby certify that the foregoing is a true and correct record of the proceedings had in the case of the State of Florida versus Urbano Torres, Case Number 83-4248, before the Honorable Ralph N. Person, Circuit Judge, at the time and place herein set forth.

Dated in the City of Miami, County of Dade, State of Florida, this 13th day of February, 1984.

/s/
LISA J. JOHNSON
Shorthand Reporter

A.

APPENDIX

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1986

URBANO TORRES, **

Appellant, **

vs. ** CASE NO. 84-793

THE STATE OF FLORIDA,**

Appellee. **

Opinion filed March 18, 1986.

Rehearing Denied April 14, 1986

An Appeal from the Circuit Court for Dade County, Ralph N. Person, Judge.

Bennett H. Brummer, Public Defender, and Elliot H. Scherker, Assistant Public Defender, for appellant.

Jim Smith, Attorney General, and Richard E. Doran, Assistant Attorney General, for appellee.

Before SCHWARTZ, C. J., and HUBBART and DANIEL S. PEARSON, JJ.

PER CURIAM.

The order denying the defendant's motion for post-conviction relief is reversed upon a holding that the evidence before the trial court indisputably failed to establish that the defendant's entry of a guilty plea to the charges against him was knowingly and voluntarily made with an understanding of the consequences. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Williams v. State, 316 So.2d 267 (Fla. 1975).

Reversed and remanded for further proceedings.

A. 3

IN THE DISTRICT
COURT OF APPEAL OF
FLORIDA THIRD DISTRICT

JANUARY TERM, A.D.
1986
MONDAY, APRIL 4,
1986

URBANO TORRES, **

Appellant, **

vs. ** CASE NO. 84-793

THE STATE OF FLORIDA, **

Appellee. **

**

Upon consideration, appellee's motion for rehearing and/or certification of question to the Florida Supreme Court is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By: _____
Deputy Clerk

cc: Richard E. Doran
Elliot Scherker

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO. 84-793

URBANO TORRES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING AND/OR CERTIFICATION OF QUESTION TO THE FLORIDA SUPREME COURT

Appellee, State of Florida, respectfully moves for rehearing and clarification of the court's opinion in this case issued March 18, 1986 pursuant to Rule 9.330(a), Fla.R.App.P (1986). In support of this motion Appellee contends:

I. The court has overlooked the Appellee's supplemental cases of Hill v. Lockhart, 473 U.S.__,106 S.Ct.366 (1985)

and United States v. Guichard, 779 F.2d 1139 (5th Cir. 1986) which are directly and expressly in conflict with the views expressed by the panel. The Fifth Circuit's Guichard opinion states:

> Rule 11 "creates a prophylactic scheme designed to insure both that guilty pleas are constitutionally made and that a full record will be available in the event that a challenge is made to the plead." United States v. Adams, 634 F.2d 830, 837 (5th Cir.1981). To this end, Rule 11 specifieds a long list of substantive and procedural requirements to be observed before a guilty plea is accepted. This Court does not, however, require "letter-perfect" compliance with all of these requirements. See United States v. Dayton, 504 F.2d 931, 939 (Cir. 1979) (en banc), cert. denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980). Indeed, in 1983 Rule 11(h) was added to ensure application of a harmless error rules in appeals based on noncompliance.

In Dayton, we held en banc that if the three core concerns of Rule 11 are met--that the guilty plead is free from coercion, that the accused understands the nature of the charges against him, and that the accused knows the direct consequences of his guilty plea--there is no violation of the body or spirit of Rule 11. Dayton, supra, at 939-40. We found that reversible error exists only when there is an "entire failure" to address any of the three core concerns of Rule 11. Id. at 939-40. However, an "inadequate address," or less than "letter-perfect" compliance with Rule 11, is harmless error if the three core concerns are met and the accused has shown a desire "to come to terms with the legal system, and to admit his fault." Id. at 940. We noted that an earlier intimation by the Supreme Court that "prejudice inheres in a failure to comply with Rule 11," McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 1173, 22 L.Ed.1.2d 418 (1969), concerned a much simpler version of Rule 11 than the Rule at issue in Dayton. Dayton, supra, at 939-40. McCarthy, we found, was concerned with the core values of Rule 11 and should not be extrapolated to require/

strict compliance with the "punctilios" of a now greatly expanded and more detailed Rule 11. Id. at 940. The dissent in Dayton disagreed with this analysis, observing that "[a]lone among the circuits that have considered the question, this court now refuses to require literal compliance with Rule 11." Id. at 948 (footnote omitted). Thus even before the adoption of Rule 11(h) we held that specific Rule 11 rights are often ancillary to the larger McCarthy concerns, and that all Rule 11 errors do not therefore require automatic reversal.

Confrontation of Witnesses

Appellant claims that during the Rule 11 proceeding accompanying his guilty plea the district judge failed to warn him that his plea waived his right to confront the witnesses against him, as required by Rule 11(c)(3). The record does indeed indicate that the district court neglected expressly to inform appellant that a guilty plea waived his right to confront witnesses, but the record also shows that all of the other requirements of Rules 11, in particular Rule 11(c), were met. Thus, as appellant claims, the record

contains technical error. As noted, however, reversal requires more than this; it requires an entire failure to meet a core concern. See id.

[1] Of the three core concerns of Rule 11, only the requirement that the accused knows the direct consequences of his plead is implicated when the accused alleges that he was not informed that a guilty plea waived his right of confrontation. In determining whether the appellant was knowledgeable of these consequences, we observe that he was informed of all other Rule 11 rights, including, inter alia, that he waived the right to a jury trial, that he waived the right not to testify against himself, that he knew the maximum penalty against him, and that he waived the right to force the state to meet its burden of proof beyon a reasonable doubt. See note 3, supra. Where, as here, the only deficiency respecting this core concern is the singular failure to mention one Rule 11(c) right, here the right of confrontation, we cannot hold that this constitutes an "entire failure"to inform the appellant of the consequences of his plea. Appellant knew he had waived a trial at which he did not have to testify and the

government had to affirmatively prove his guilt, and could not rely on any failure of his to testify, all of which to a significant extent implies a waiver of the right of confrontation. Moreover, we observed that appellant had the competent counsel who obviously had advised him both of the charge and the ramifications of a guilty plea. We find, therefore, that appellant knew the consequences of his plea. United States v. Caston, 615 F.2d 1111, 1115-16 (5th Cir.), cert. denied, 449 U.S. 831, 101 S.Ct. 99, 66 L.Ed.2d 36 (1980).

Additionally, in the past we have held similar types of errors harmless. See Caston, supra, at 1115-16. In Caston, for example, we held that despite the district judge's failure to inform the defendant of his right to a jury, of his right to the assistance of counsel at trial, of his right not to incriminate himself at trial, and that his sworn answers to the court's questions could be used against him in perjury charges, all of which are required by Rule 11, the error was harmless. Caston, supra.

* * *

Our analysis is further strengthened by the addition of

> section (h) in the 1983 amendments to Rule 11, providing: "Any variance from the procedures required by this rule which does not affect substantive rights shall be disregarded." This amendment reversed the per se doctrine then in vogue for Rule 11 violations, see Dayton, supra, at 948 (dissent), and instituted a harmlelss error analysis. Like Fed.R.Crim.P. 52(a), the harmless error provision for most other criminal case procedural violations see Rule 11(h) advisory committee notes (discussing how McCarthy led many appellate courts to reject harmless errors for Rule 11 cases), the new Rule 11(h) does not attempt to define harmless error.
>
> Id. at 1142-43. (Footnotes omitted) (emphasis added).

What was alleged below, as is so clearly evidenced by the motion to vacate[1] and supplemental transcript of the

---

[1] The motion to vacate alleges:

A. Ground One: Conviction obtained by plea of guilty which was not made volun-

February 6, 1984, evidentiary hearing, is a claim of ineffective assistance of counsel which caused the defendant to plead guilty out of fear for his life:

tarily with the understanding of the consequences of the plea.

Supporting FACTS (tell your story briefly without citing cases or law):

Defendant was charged with First Degree Murder. He was represented by a Court-appointed Special Public Defender. Defendant pleaded guilty on the basis of threats by the police that he would certainly receive the death penalty if he did not do so. When he asked his attorney for advice, he was told the same thing. Seeing no possible way to win in this situation, since his Court-appointed counsel did not appear to be willing to use his full abilities to prevent a conviction, and given the threats of the police, the Defenant unwillingly peaded guilty.

[MR. EVANS]: Now, in your affidavit you say that when you asked your attorney what you should do, you say he did not appear to be willing to use his full abilities to prevent a conviction and that seeing no possible way, you confessed, and that your attorney told you that you would possibly get the death penalty if you didn't confess and plead guilty. Are those the allegations that you are making against your former attorney?

A. Yes.

Q. Tell me what happened between you and the attorney, what he said, what you said and why you pled guilty.

A. About three or four--sometime--three or four days before I was sentenced, the attorney the gentleman who was there, went to the cells there down below and he told me that they were asking the electric chair for me.

I told him that I was innocent, that, please, to do someting for me. He said, no, I can't do anything for you. And he said to me, you are going to plead guilty? And I said, yes. He said, why? That is because I have no family there and I was scared that my mother should find out that they

> had--that they had put me in the electric chair.
>
> (S.R.8).

Based on the allegations made in the pro se motion to vacate sentence (R.121) and during the evidentiary hearing of February 6, 1984, the defendant was required to allege and prove prejudice, as argued vigorously by appellee but, apparently, overlooked by the court. The United States Supreme Court could not have been more clear in the Hill case.

> In addition, we believe that requiring a showing of "prejudice" from defendants who seek to challenge the validity of their guilty pleas on the ground of inefective assistance of counsel will serve the fundamental interes in the finality of guilty pleas we identified in Unted States v. Timmreck, 441 U.S. 780, 99 S.Ct.2085, 60 L.Ed.2d 643 (1979).
>
> Id. at 106 S.Ct. 370.

It appears that the panel's review of the issue of a "knowing and voluntary" waiver of rights has focused on the "knowing" element instead of the "voluntary" element. If this is true, the court has overlooked the specific allegations in the motion to vacate (R.121) and the statements of the appellant at the hearing when questioned by his assistant public defender as to the thrust of his complaint:

> Q. During this conversation did you understand everything that was being said to you through the interpreter?
>
> A. Yes.
>
> Q. You have sworn to the allegations set forth in this motion that you filed; correct?
>
> A. Yes.
>
> Q. In this affidavit that you swore to you state, "Seeing no pos-

sible way to win in this situation, sinxw his Court-appointed counsel did not"--

A. Yes---

Q. --conviction and given the threat to the police, the defendant unequivocally plead guilty."

Is that your allegation today in Court?

A. Yes.

MR. EVANS That's it for me at this point.

(S.R.11).

The record unequivocally refutes the notion that the plea was not "knowingly" made and refutes the notion that appellant did not understand either the charges against him or the direct consequences of the plea. This is why Boykin v. Alabama, 395 U.S. 238 (1969) does not control in this matter! The only specific omssions of constitutional rights in the plea colloquy were the indications of a

right to compel the production of evidence and the right to cross-examination. These constitutional concerns are not core requirements of the plea, Guichard, supra, and the failure to include them in the process of the plea colloquy does not, absent a showing of prejudice, render this guilty plea invalid. Rule 3.172(i), Fla.R.Cirm.P. (1977). Appellee contends the panel has overlooked this crucial distinction between cases where there is a voluntarily guilty plea without any understanding of what that action means and cases, such as this one, where a defendant knows what he is doing and what it means, but claims he had no other choice because his lawyer would not help him win his case.

Wherefore, appellee respectfully requests the court recall this opinion and affirm the order of the trial court. In this alternative, appellee requests the court certify the question to the Florida Supreme Court.

Respectfully submitted,

JIM SMITH
Attorney General

/s/
RICHARD E. DORAN
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue,
Suite 820
Miami, Florida 33128
(305) 377-5441

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION FOR REHEARING AND/OR CERTIFICATION OF QUESTION TO THE FLORIDA SUPREME COURT was furnished by mail to ELLIOT SCHERKER, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 21 day of March, 1986.

/s/
RICHARD E. DORAN
Assistant Attorney General

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT, IN
AND FOR DADE COUNTY,
STATE OF FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. / CASE NO. 83-4248
/
URBANO TORRES, /
/
Defendant. /
/
_____/

MOTION FOR POST CONVICTION RELIEF

COMES NOW the defendant URBANO TORRES, pro se, pursuant to the allowance of Rule 3.850 Fla.R.Crim.P., and moves this Court as aforesaid, alleging the following in support hereof:

1. Name and location of the Court which entered the Judgment of Conviction under attack: Eleventh Judicial Circuit Court, in and for Dade County, Miami, Florida .

2. Date of Judgment of conviction: October 4, 1983 .

3. Length of Sentence: Life .

4. Nature of offenses(s) involved

(all counts): _____
Murder First Degree _____.

5. What was your plea? (check only one).

(a) Not guilty ____
(b) Guilty XX
(c) Nolo contendere ____
(d) Not guilty by reason of insanity ____

If you entered one plea to one count, and a different plea to another count, give details: _____.

6. Kind of trial (check only one):

(a) Jury___
(b) Judge only, without jury XX

7. Did you testify at the trial or at any pre-trial hearing?

Yes____ No XX

8. Did you appeal from the Judgment of conviction?

Yes_____ No XX

9. If you did appeal, answer the following:

(a) Name of Court: _____
(b) Result: _____
(c) Date of result: _____
(d) Citation (if known): _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions,

etc., with respect to this judgment in this court?

Yes____ No __XX__

11. If your answer to number 10 was "yes" give the following information (applies only to proceedings in this court):

(a) (1) Nature of the proceedings:

_____

(2) Grounds raised:_____

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes _____ No_____

(4) Result:_____

(5) Date of result:_____

(b) As to any second petition, application, motion etc., give the same information:

(1) Nature of proceeding:

_____

(2) Grounds raised:_____

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes_____ No _____

(4) Result:_____

(5) Date result:_____

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment in any other court?

Yes ____ No XX

13. If your answer to number 12 was "yes" give the following information:

(a) (1) Name of Court:_____

(2) Nature of the proceedings:

_____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, applicaiton, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(b) As to any second petition, application, motion, etc., give the same informaiton:

(1) Name of Court:_____

(2) Nature of the proceeding:

_____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(c) As to any third petition, application, motion, etc., give the same informaiton:

(1) Name of Court: _____

(2) Nature of the proceeding:

_____

(3) Grcunds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.
For you information, the following is a list of the most frequently

raised grounds for post conviciton relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that your conviction or sentence is unlawful.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the Court if you merely check (a) through (l)

(a) Conviction obtained by plea of guilty or nolo contendere which was unlawfully induced or not made voluntarily with the understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected or impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

(k) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute).

(l) Sentence in excess of the maximum authorized by law.

A. Ground One: Conviction obtained by plea of guilty which was not made voluntarily with the understanding of the consequences of the plea.

Supporting FACTS (tell your story briefly without citing cases or law):

Defendant was charged with First Degree Murder. He was represented by a Court-appointed Special Public Defender. Defendant pleaded guilty on the basis of threats by the police that he would certainly receive the death penalty if he did not do so. When he asked his attorney

for advice, he was told the same thing. Seeing no possible way to win in this situation, since his Court-appointed counsel did not appear to be willing to use his full abilities to prevent a conviction, and given the threats of the police, the Defendant unwillingly pleaded guilty.

B. Ground Two: Conviction obtained by used of coerced confession.

Supporting FACTS (tell your story briefly without citing cases or law).

The victim in this case was a good friend of the Defendant. Although the Defendant was read his rights under the Miranda decision, he confessed to the crime due to the threat of the police interrogation team that unless he did confess, he would receive the death penalty for his offense. Defendant was sufficiently frightened by this threat that the dry, pro forma reading of the Miranda rights did not make an impression. Defendant did not ask for an attorney until September, 1983, after being arrested and giving his confession in February, 1983, some seven months earlier, Defendant asserts that the threat of the electric chair by the police was unduly coercive and resulted in his confession.

C. Ground Three: _____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

D. Ground Four:_____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

15. If any of the grounds listed in 14A. B. C. and D were not previously presented on your direct appeal, state briefly what grounds were not so presented, and give your reasons why they were not so presented:

No appeal was taken, or could be taken, from a guilty plea.

16. Do you have any petition, application, appeal, motion, etc., now pending in any Court, either state or federal, as to the judgment under attack?

Yes ____ No XX

17. If your answer to number 16 was "yes", give the following information:

(a) Name of Court:_____

(b) Nature of the proceeding:_____

_____

(c) Grounds raised: _____

_____

(d) Status of the proceedings:

_____

18. Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:

(a) At preliminary hearing: Harold T. Fields, Jr., Suite 204, 1333 Coral Way, Miami, Florida 33145

(b) At arraignment and plea: Harold T. Fields, Jr.

(c) At trial: Not Applicable

(d) At sentencing: Harld T. Fields Jr.

(e) On appeal: Not Applicable

(f) In any post conviction proceedings: Pro se

(g) On appeal from any adverse ruling in a post conviction proceeding: Not Applicable

WHEREFORE, Movant prays that the Court grant all relief to which he may be entitled in this proceeding, including not not limited to:

1. That the Court order an evidentiary hearing be held in the issues of involuntary plea and coerced confession and appoint a Special Public Defender to represent Defendant therein.

2. That the Court allow Defendant to withdraw his guilty plea and proceed to trial on the charges, and order the suppression of Defendant's coerced confession.

3. Such other and further relief as the Court deems just and proper.

STATE OF FLORIDA)
) ss.
COUNTY OF UNION)

Before me, the undersigned authority, this day personally appeared URBANO TORRES who first being duly sworn, says that he is the Defendant in the above styled cause that he has read the foregoing Motion for Post Conviction Relief and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct to the best of his knowledge and belief.

/s/
Defendant, pro se

SWORN AND SUBSCRIBED TO before me this 3rd day of November, 1983.

/s/
NOTARY PUBLIC STATE OF FLORIDA

My Commission Expires: NOTARY PUBLIC, STATE OF FLORIDA AT LARGE MY COMMISSION EXPIRES NOV. 5, 1983

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

THE STATE OF FLORIDA
VS# 83-4248
URBANO ACUNAS TORRES AKA:
RAFAEL HERNANDEZ
Defendant

ORDER DENYING MOTION FOR RELIEF PURSUANT TO RCrP 3.850

THIS CAUSE HAVING COME ON BEFORE the Court upon the Motion of the above prisoner for relief pursuant to RULE 3.850, Criminal Procedure, and the Court having examined the said Motion and finding that the allegations contained therein do not constitute legal grounds for granting a New Trial or release of the prisoner, and the Motion being insufficient in substance to support the relief prayed, it is thereupon,

CONSIDERED, ORDERED AND ADJUDGED that the Motion for Relief pursuant to RULE 3.850, Criminal Procedure, filed by the

above prisoner be, and the same is hereby DENIED.

The movant is advised that ___ he has the right to appeal within thirty days of the rendition of this order and is further advised that ___ he may file a Motion for rehearing with fifteen days of the date of service of this order.

DONE AND ORDERED in Open Court at Miami, Dade County, Florida, this 16th day of March, A.D., 1984.

/s/
Judge
RALPH N. PERSON

I CERTIFY that copy hereof has been furnished to movant, Urbano Acunas Torres aka Rafael Hernandez, by mail this 19 day of March, 19 84.

RICHARD P. BRINKER, Clerk

By: /s/
Deputy Clerk

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY,
FLORIDA

STATE OF FLORIDA, Plaintiff,	CRIMINAL DIVISION
vs.	CASE NO. 83-4248
URBANO TORRES, Defendant.	

Metropolitan Justice Building
1351 Northwest 12th Street
Miami, Florida
October 4, 1983
Tuesday, 9:00 a.m.

The above-entitled matter came on for hearing before the Honorable Ralph N. Person, Circuit Judge, pursuant to Notice.

- - -

APPEARANCES:

JANET RENO, State Attorney, by
JAY NOVICK, Assistant State Attorney
on behalf of the State.

HAROLD FIELDS, ESQ.,
on behalf of the Defendant.

ALSO PRESENT:

ANA SHORE, Interpreter

MR. NOVICK: The interpreter is here and we have the defendant.

There is a negotiated plea in this particular case.

It is my understanding that the defendant is going to plead guilty as charged to the indictment and be sentenced to life in prison with a mandatory 25 years for the first-degree murder, and whatever sentence the Court wants to run concurrent; not consecutive.

MR. FIELDS: Yes.

THE COURT: All right.

Raise your right hand and be sworn.

(Thereupon, ANA SHORE, was qualified as the interpreter.)

(Thereupon, URBANO TOREES, a defendant, was duly sworn, after which the following proceedings were had):

THE COURT: All right.

Mr. Torres, please state your name, for the record.

THE DEFENDANT: (Through the interpreter) Urbano Torres.

THE COURT: How old are you, please?

THE DEFENDANT: Twenty years,

THE COURT: Mr. Torres, are you aware of the charges against you?

THE DEFENDANT: Yes, I am.

THE COURT: Your attorney has indicated at this time you are going to enter a plea to the matter of guilty with the understanding the Court will sentence you to life, 25 years minimum mandatory. That this was negotiated with that the State was seeking the death penalty in your case as you are well aware.

Additionally, this case involved confessions and certain legal issues that have already been litigated by the Court; already been removed by the Court against you, and your electing, at this

point, to enter a plea after having fought the case up to this point; is that correct?

You're entering this plea of guilty; is that correct?

MR. FIELDS: Can I have an opportunity to speak to him, your Honor?

THE COURT: Sure, you may.

(Thereupon, other matters were called after which the following proceedings were had on Urbano Torres):

MR. NOVICK: Judge, back on Urbano Torres' case.

THE COURT: Mr. Torres, there are certain rights that you are giving up by entering this plea. You are giving up the right to a trial by jury. The right to be tried by the Court and you are also giving up the right to have your case appealed. That is to appeal the judgment and sentence of the Court from a trial if we

were to, but which we are not having a trial.

You are stipulating to a prima facie case of guilt here and need ---

MR. NOVICK: I would ask the Court to relay what we heard yesterday.

THE COURT: I think we did hear during the suppression, no objection utilates those factors; the purpose of finding a prima facie case of guilt.

The Court should further point out that I was made at least aware that there were at least, even if the lawyers differ, as to how they would be weighed in terms of death. What the State considered to be five good aggravating--one of which is involvement in the other similar type of case in the past. Even though ultimately ended up with not a deathly but an aggravate the crime. But there was death involved; was there not?

MR. NOVICK: Correct. Wasn't similar. In fact there was in Los Angeles.

THE COURT: Mr. Torres, under the circumstances, is this what you are going to do?

THE DEFENDANT: Yes.

THE COURT: I know Mr. Fields has spent a lot of time working on this case, traveling around the country.

Are you satisfied that he understands the nature of this and appreciate the consequences of this guilty plea?

MR. FIELDS: Yes, your Honor.

THE COURT: All right.

The Court at this time, based upon the stipulated facts during the suppression hearing, the Court finds that you are doing this freely and voluntarily.

Mr. Torres has been represented by a competent attorney and the Court will

find the facts which the State would be prepared to prove and which admitted by your plea of guilt would be sufficient to sustain the finding of guilt by the trier of fact.

All right. Judgment sentence-- the Court as to count one, the Court will sentence you to a term of life inprisonment.

Count two, being a concurrent 15 and pursuant to the statute, 25 year minimum mandatory. Even though I didn't read the confession in this case, I know the motions were directed towards the suppression of confession in Court. As a matter of fact, I didn't read the confession.

MR. NOVICK: As a matter of fact, but they were introduced in evidence. They are there for the record.

THE COURT: Okay.

(Thereupon, this hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, the undersigned, do hereby certify that the foregoing is a true and correct record of the proceedings had in the case of the State of Florida versus Urbano Torres, Case Number 83-4248, before the Honorable Ralph N. Person, Circuit Judge, at the time and place herein set forth.

Dated in the City of Miami, County of Dade, State of Florida, this 13th day of February, 1984.

/s/
LISA J. JOHNSON
Shorthand Reporter